BOON & CHEAH STEEL PIPES SDN. BHD. v. ASIA INSURANCE CO. LTD. & ORS.

[O.C.J. (Raja Azlan Shah J.) January 16, 1972]

[Kuala Lumpur — Civil Suit No. 757 of 1970]

Insurance — Marine Insurance — Whether cargo was constructive total loss — De minimis rule — Whether cargo was actual total loss — Marine Insurance Act, 1906 — Institute Cargo Clause (F.P.A.), cl. 6.

In this case a cargo of 668 steel pipes was insured in a voyage from Prai to Brunei by a barge towed by a tug. In the course of the voyage, the vessel and cargo sustained damage by perils of the sea insured against and as a result all but 12 of the pipes fell into the sea. The vessel was obliged to put into a shipyard in Singapore. On visual inspection the surviving pipes appeared to have sustained damage. No joint survey was however called for or made. The plaintiffs who were the owners of the pipes brought this action against the underwriters to recover the amount insured. The plaintiffs put their claim in two ways (a) that the cargo was a total constructive loss, as the costs to recondition and forward the damaged pipes to Brunei would exceed their value on arrival (a) the cargo was an actual total loss by reason of the rule *de minimis non curat lex.* The defence was a denial that the cargo which was insured under one single consignment was a total loss. It was contended that under the policy the defendants would be liable for total loss only.

Held: (1) the plaintiffs had failed to prove damage. There was a duty upon the plaintiffs to notify the underwriters and obtain a survey report. There was nothing to explain their failure to ask for such a report or for a prompt and detailed examination of the pipes;

(2) in determining whether the cargo was a constructive total loss the true test in the present case where the cargo could be looked at and the cost of repair estimated, was whether the cost of recovering, reconditioning and forwarding the cargo to the destination would exceed their value on arrival. In the absence of a detailed examination in this case, it was not possible to hold that there was a constructive total loss within the meaning of the policy;

(3) the 12 pipes in this case costing $14,400 affect far too high a proportion of the whole consignment to be capable of being dismissed as a matter *de minimis.*

Cases referred to:-

(1) *C.B. Roux* v. *Salvador* 132 E.R. 413, at p. 421.

(2) *Angel* v. *Merchant's Marine Insurance* [1903] 1 K.B. 811 at p. 816.

(3) *Moss* v. *Smith* 139 E.R. 827 at p. 831

(4) *Cator & Ors.* v. *Great Western Insurance Company of New York* (1873) L.R. 8 C.P. 552.

(5) *J. Lysaght Ltd.* v. *Coleman* [1895] 1 Q.B. 49.

(6) *Overseas Commodities Ltd.* v. *Svagle* (1958 51 L.L.R. 546.

(7) *Margaronis Navigation Agencey Ltd.* v. *Henry W. Peabody & Co. of London Ltd.* [1965] 2 Q.B. 430.

CIVIL SUIT.

E. F. N. Gratiaen Q.C. (*V. C. George* with him) for the plaintiffs.

M. J. Mustill Q.C. (*Peter Mooney* with him) for the defendant.

Raja Azlan Shah J.: A cargo of 668 steel pipes was insured free from particular average, on a voyage from Prai to Brunei by a barge towed by the tug "Selvaliant". In the course of the voyage, the vessel and cargo sustained damage by perils of the sea insured against and as a result all but 12 of the pipes fell into the sea. The vessel was obliged to put into the defendant No. 2's shipyard in Singapore. On visual inspection the surviving pipes appeared to have sustained damage. The plaintiffs who were the owners of the pipes brought this action against defendants No. 1, the underwriters, to recover the amount insured *i.e.*, $938,702.49. The action against defendants No. 2, the owners of the vessel, was stayed because the writ was not served on them.

There is a great deal of common ground between the parties. First, English Law applied *i.e.*, the English Marine Insurance Act, 1906 applied subject to any express terms in the contract of insurance. Secondly, the plaintiffs had entered into a contract with the Brunei Government to supply the latter with $8.5 million worth of steel pipes. Most of the pipes were 36" pipes, 30 ft. long and 3 tons in weight and priced at $1,200 each. They had by March, 1970 fulfilled their part of the contract. Thirdly, the plaintiffs had entered into a contract of carriage with the defendants No. 2 to ship the said pipes in not less than 8 separate voyages. The first voyage reached its destination. The present claim is in respect of the second shipment. Lastly, in consequence of the perils of the sea insured against 98.3% of the pipes went overboard.

The plaintiffs put their claim in one of two ways. First, they said the cargo was a constructive total loss. They said because the costs to recondition and forward the damaged pipes to Brunei would exceed their value on arrival, they, as an uninsured prudent owner would do in like circumstances, had no alternative but to abandon them, which they did by notice. It is not disputed that no joint survey was either called for or made. Such survey was rendered necessary under the policy in cases of loss or damage. Secondly, they said the cargo was an actual total loss by reason of the rule *de minimis non curat lex.*

The defence was a denial that the cargo which was insured under one single consignment was a total loss. They contended that under the policy they would be liable for a total loss only and the premium was calculated with reference to their liability for a total loss.

I will now consider the arguments advanced as regards constructive total loss. Mr. Gratiaen on behalf of the plaintiffs, submitted that here 98.3% of the pipes fell into the sea and the rest was brought to Singapore, damaged. He submitted that the proper test to apply in a case like the present is the "prudent uninsured owner" test as explained by Lord Abinger in *C. B. Roux* v. *Salvador*(1) and Vaugham Williams L.J. in *Angel* v. *Merchant's Marine Insurance Company.*(2) Applying that test, he argued that because of the considerable damage sustained by the surviving pipes an uninsured businessman would really abandon them. I cannot subscribe to this view. In determining whether the cargo was a constructive total loss, the true test in the present case where the cargo could be looked at and the cost of repair estimated, is whether the cost of recovering, reconditioning and forwarding the cargo to the destination would exceed their value on arrival. The "prudent uninsured owner" test must be discarded. Nothing under the present policy would make the defendants liable as for a constructive total loss except the impossibility of recovering, re-

conditioning and forwarding the cargo to their destination at a cost greater than their value on arrival. I am fortified in this view by the express conditions of clause 6 of the Institute Cargo Clauses (E.P.A.) which is annexed to and forming part of the policy. Clause 6 is now reproduced:

"No claim for Constructive Total Loss shall be recoverable hereunder unless the goods are reasonably abandoned either on account of their actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the goods to the destination to which they are insured would exceed their value on arrival."

In my view where the damaged pipes cannot be reconditioned and forwarded to its destination without laying out more money than it is worth, the reconditioning etc. are impracticable, and therefore, as between the underwriters and the assured, impossible. There is then constructive total loss. If it can, the cargo is practically capable of being reconditioned and forwarded to its destination and the assured cannot recover as for a constructive total loss. Whether the cargo can practically be reconditioned and forwarded to its destination would depend on the circumstances of each particular case. In my opinion the word "practicable" as explained by Maule J. in *Moss* v. *Smith*[3] is the criterion between total and partial loss. Although that case was decided before the coming into force of the Marine Insurance Act, 1906 it cannot be doubted that the principles are equally applicable under the Act. "In matters of business" says the learned judge "a thing is commonly treated as 'impossible', when it is impracticable, and as 'impracticable', when it cannot be done without laying out more money than the thing is worth."

Applying these general principles, when the cargo arrived in Singapore, it would have been the duty of the plaintiffs or their representatives to ascertain, first, the extent of damage, and, secondly, whether the cost of reconditioning and forwarding them to Brunei would exceed their value on arrival. If the cost would exceed the value on arrival then it would not have been practical to deliver the cargo at its destination. There would have been constructive total loss. If the cost would not exceed the value on arrival, the plaintiffs could not recover as for a constructive total loss because it was practical to deliver the cargo without laying out more money than it is worth at the place of destination.

In a careful and painstaking argument Mr. Mustill on behalf of the defendants, submitted that in order to succeed the plaintiffs must prove damage; mere suspicion of damage, he said, was not enough. Unless the plaintiffs have proved damage they would not be able to prove how much it would cost them to repair, and without knowing the cost of repair it was difficult to ascertain whether such costs would exceed the value on arrival. This no doubt turns on the burden of proof. It was said that the underwriters had insured against actual damage to the goods but not against prejudice or suspicion of damage. Counsel, in my opinion, has stated the law correctly. The plaintiffs have to prove on the balance of probabilities, as distinct from a mere speculative possibility, that there is damage. However great the suspicion of damage and however strong the moral belief and conviction of the plaintiffs, unless damage is proved on the balance of probabilities on the basis of legal evidence and material on record, there cannot be proof of damage.

This is well illustrated by three cases. In *Cator and Others* v. *The Great Western Insurance Company of New York*,[4] the policy of marine insurance was expressed to be on 1711 packages of tea; 449 packages were greatly damaged by contact with sea-water, while the remainder, 1262 packages arrived in a perfectly sound and good condition. The damaged packages were sold at a price substantially below their market value owing to the suspicion attaching to them from the fact that 449 packages in the same shipment were damaged. Bovill C.J. delivering the judgment of the court, rejected the claim for the loss on sale of the undamaged packages. In a passage at page 559 the learned Chief Justice said:

"The insurance is against damage to the goods, and not against loss to the assured otherwise than by reason of damage to the goods themselves.... The underwriters insure against damage to the goods by the perils insured against; but they do not, in our opinion, insure against damage by prejudice or suspicion, though such prejudice or suspicion be reasonable and be general in fact in business, when there is no damage in fact to the goods themselves; and, if this policy were to be so construed, it would make them insureers, not only against direct damage to the goods insured, but against damage to other goods in the same ship affecting the credit and thereby the value of the goods insured, and would create indirect and collateral and consequential liabilities from suspicion and prejudice, which it would be almost impossible for the underwriters to estimate in fixing a premium proportionate to the risk."

(*ibid.*, at page 561) —

"If such a claim as this could be supported, it might next be contended that the underwriters would be responsible if the reputation and value of sound teas were affected by serious damage to the ship, or to other persons' goods in the same ship which were damaged by sea water, or for the loss of markets by delay through the perils of navigation.
It appears to us that the underwriters insure against actual damage, and do not in any sense guarantee that the goods shall arrive free from suspicion of damage."

J. Lysaght, Limited v. *Coleman*[5] is to the same effect. In that case a cargo of 497 cases of galvanized iron was insured from Bristol to London. On arrival the whole cargo was landed, unpacked and examined. It was found that 106 cases had been damaged. The assured was indemnified in respect of the damaged cargo, (that is, the difference between the invoice price and sale price) as well as the costs incurred on examining the damaged cargo. But they further claimed the costs of inspection incurred in respect of the undamaged cargo. Lord Esher M.R. had this to say on the point (*ibid.*, at page 53):

"They must put their claim in one of two ways. One way is to say that the undamaged goods were made of less value because of the damage to the other packages, because thereby they had lost their character and would not sell for so much in the market. If they put their claim in this way, the answer is that it is contrary to the rules of insurance."

A little down the passage the Master of the Rolls said:

"In Stevens on Average, in part 1 s. 3, art. 10, it is pointed out that the underwriter engages to guarantee the assured against the direct operation of sea damage and not against the consequential results; and the highest that could be said of the claim in this case is that it was in respect of damage which was a consequential result of the sea peril, and it is very doubtful whether that could be justly said."

In almost the same vein Lopes L.J. said (at page 54):

"It appears to me that there is a short answer to this contention to be found on looking at the policy. The thing insured against is actual damage by perils of the sea, and there has been no actual damage to the contents of these cases. The underwriters do not guarantee that the goods when they arrive shall be free from suspicion of damage, and the most that can be said of these goods is that there was a suspicion that they might have been damaged. That is a matter in respect of which the assured are not entitled to recover."

Rigby L.J. had this to add:

"It cannot be said that a suspicion of damage entitled them to incur costs, at the expense of the underwriters, if no damage had actually taken place; and if that may be said with truth as to the whole cargo, I think it follows that they could not in this case be entitled to make good this claim against the underwriters in respect of the goods to which there had been no damage." (*ibid.*, page 54).

Lastly there is the case of *Overseas Commodities Ltd.* v. *Style*,(6) where McNair J. relied strongly on the reasoning of the decisions in the above two cases. The learned judge expressed the view that had the question been material for his judgment, he would have upheld the underwriters' contention that the insurance being an insurance against physical loss or damage to the goods, financial loss resulting from sound goods being suspect was not recoverable as a particular average loss.

The facts in that case were very similar to that in *Cator's* case. There was an insurance on two shipments of tinned pork. Some of the tins were condemned while others were not. The uncondemned tins were sold at prices below the current price for sound goods owing to the fact that the two shipments had become suspect to the trade.

As a corollary to his two points, Mr. Mustill has put his case upon the proposition that the costs of repair or inspection of suspected goods is not an element to be taken into account when deciding whether there was a constructive total loss. I think the three authorities cited seem to support his proposition. Be that as it may the point principally for consideration is whether the plaintiffs have proved damage. In the absence of such proof the claim to a constructive total loss will fail because in order to establish such loss the plaintiffs must bring themselves within the second limb of clause 6 of the Institute Cargo Clause (F.P.A.).

Therefore the first question to determine is: was there damage; if so, extent of damage. Once that is established, the next point to consider is: what would be the costs of recovering, reconditioning and forwarding them; and if so, do such costs exceed the value of the pipes on arrival. If the first point is not established then the second point will not arise for determination. One must place the horse before the cart. This leads me to embark upon an examination of the evidence.

The (second) shipment left Prai on August 31, 1969. It consisted of 643 36" pipes of 3C' in length and 25 special pipes. They were stacked in 5 stacks of 117 pipes each. Cushions were placed underneath each stack which was about 20' to 30' high, as can be seen in the photograph in respect of the first shipment (Ex. P5). The pipes were latched to stanchions by steel ropes. Gunnysacks were placed between each pipe to protect the outer coating as well as against vibrations.

On September 8, 1969 Mr. Tan Ah Heng (PW1), the Managing Director of the plaintiffs (at the material time the executive director) was informed of the casualty. He visited the barge when it arrived at defendant No. 2's shipyard at Singapore on September 12, 1969. After visual examination he discovered that some of the 12 pipes were badly damaged and some were superficially damaged. He described the damage as follows:

"The bitumen outer wrapping had fallen off to the bare steal which was rusty and tasted of salt; in 5 or 6 cases the lips were dented and in some the concrete lining had broken and fallen off and in some there were long cracks."

He further said that the damage he saw on that day were similar to that shown in photographs Ex. P2 which were taken by Mr. Booth (PW2) some 2¼ years later. Mr. Tan's impression of the 12 pipes was that they were unserviceable but he admitted that he did not have them tested to find out whether they were in such a state. He made a mental calculation as to the would-be estimate to repair and estimated it at $1,700 per pipe inclusive of transport as against the selling-price of $1,200 and concluded that it would be uneconomical to have them taken back to their factory in Ipoh (approximately 386 miles) for repairs. On the possibility of having the pipes repaired in Singapore, he said he did not make any investigation but only assumed that Hume Industres, the only other steel manufacturer in the region, would not have consented to repair them. Two other factors which had influenced him against having the repairs to be done in Singapore were that his overhead charges were cheaper than that of Humes and that their agreement with the Brunei Government prohibited them from effecting repairs elsewhere than in Ipoh. Therefore he decided to abandon them as total loss.

On the 17th he returned to Kuala Lumpur and discussed this matter with Mr. Peter Kuan, the Plaintiffs' Manager in charge of production (PW4). Mr. Kuan assumed the worst. He too formed the opinion that the pipes must be taken back to Ipoh for testing. He too estimated the cost at $1,700 per pipe. He was also of the impression that the pipes could not be tested in Singapore simply because he assumed that Hume Industries would not do the job. On the 17th the plaintiffs gave notice of abandonment.

Mr. Douglas Lim, PW5, (the Marine Co-ordinator of defendant No. 2) gave evidence which was directed solely to his recollection of the casual examination of the pipes which he made some 2½ years ago. He said that on the date when the barge arrived he boarded it with Mr. Tan. His recollection was that some pipes were heavily dented, some scratchings had been scraped off and the entire length of one or two pipes had been heavily compressed. Three days after the arrival he supervised the unloading of the pipes to defendant No. 2's yard by the waterfront. The pipes remained in the yard for two months. During that time no one claimed any proprietory interest in them. Since then the pipes had been removed to the sub-

contractor's yard as shown in Ex. P2. He said Mr. Tan did not tell him that the latter wanted to abandon the pipes. He further said that there were originally 12 pipes but now there were only 11 because one of his executives had used one of them.

Mr. Anthony Geoffry Booth (PW2) the Inspecting Engineer of Messrs. Independent Testing Company Limited, Singapore, gave an opinion that he would be reluctant to release the pipes because he suspected damage after hearing of the accident. He said he saw and photographed the pipes (Ex. P2) just before Christmas, 1971, *i.e.* some 2¼ years after the occurrence. His summary of the damage is as follows:

"Every pipe had some damage in fact. Most of them had some dents on one or two ends (compare the testimony of Mr. Tan who said there were 5 or 6 dents) and all other wrappings were damaged. I have not accurately examined every wrapping but every pipe had wrapping defect."

Mr. Booth gave an opinion that a normal purchaser would have inspected rather than assumed the nature and extent of damage. And once that was assessed he said that it was necessary to reshape the damaged ends, to re-hydrostatic test each pipe to determine whether there were any holes or leaks and to radiographic test some percentage of the damaged pipes. In my opinion Mr. Booth's testimony is clouded by the inordinate delay of inspecting the damaged pipes which he admitted that some could have been caused after the event. Indeed his evidence is given without knowledge of its past history, in particular, the number of times the damaged pipes were moved to the present site. He would therefore be in a less disadvantageous position than a person like Mr. Tan who saw the said pipes some 3 days after the accident. Although Mr. Booth said it would not be safe to assume superficial damage by mere visual inspection I take the view that it would be equally unsafe to assume serious damage by such inspection.

Mr. Robert Ryan Wilcox (PW3) the Crown Agents was the Consulting Engineer appointed by the Brunei Government under the contract. He would certify that the pipes conformed to specification. He was referred to the photographs Ex. P2; he said he saw evidence of damage but would not be able to assess the extent of damage which would largely depend on extensive examination. He therefore said that in cases of minor damage that could be repaired at port but in cases of extensive damage the pipes would have to be sent back to the manufacturers for further examination and repairs. In my view Mr. Wilcox too suffered from a handicap. He gave an opinion based solely on the evidence of the photographs. He could not say by looking at them alone that the pipes would be a write-off. What baffles comprehension is that living in Singapore (and literally on the spot) the plaintiffs never asked him to certify the pipes when they arrived in Singapore in September, 1969.

At the request of defendant No. 2, Captain William Peter Clarke (DW1) Managing Director and General Manager of Singapore Adjusters and Surveyors, a firm of Marine and Cargo Sailors and General Assessors of Insurance, inspected the pipes very soon after the barge arrived in Singapore for the purpose of making a report into the loss of the said pipes. He took the 7 photographs (Ex. P1) but none of them highlighted the damage. He was of the opinion that the surviving pipes were repairable; the damage was superficial and there was no apparent damage on the exterior. The damage which seemed to appear in Ex. P2 (9), (14) and (21) were not there when he saw the pipes in September, 1969. He did not consider it necessary to look for evidence of more serious damage in view of his finding. The damage which he said he saw on that day was not the same as that appearing in Ex. P2 which he said appeared to have considerably deteriorated, for example, melting of the bitumastic cover after being exposed to hot weather condition for some 2 years.

As in the case of Mr. Booth and Mr. Wilcox, Mr. Philip Arther Gruber (DW2) a mechanical engineer with 9 years' experience in works involving steel pipes, never saw the damaged pipes. He was consulted about these pipes only 3 days before the hearing. Anyway from what he could see from the photographs (Ex. D1) which he admitted were not very satisfactory, the damage was nothing more than superficial and could be repaired at the dock. He said there was no necessity in view of the nature of the injury to return them to the manufacturers for repairs. He said that the damage to the concrete lining could be detected on visual inspection because the lining would normally fracture if damaged. With regard to repairs, he said that that could easily be done at the site. In any event the pipes had to be re-lined when they reached Brunei. He further said that the worst dents could easily be repaired. He observed that the ends of the pipes were not protected with Hessian padding in accordance with the specifications. The bitumen wrapping which was principally for corrosion protection could be tested by a holiday detector which was a portable instrument and easily obtainable in Singapore. In any event this witness agreed with the rest that he would have insisted on complete inspection of the pipes before deciding whether they were unserviceable.

Mr. Robert John Gray (DW3) the Managing Director of defendant No. 2, had been closely associated with Hume Industries for approximately 13 years. I consider him as a man highly qualified to speak on steel pipes. He said that one of the simplest forms to manufacture steel pipes is the 36" steel pipe and it is tested only by hydrostatic and not by radiographic tests. He further said that these pipes are robust and not difficult to repair. Mr. Gray inspected the damaged pipes on shore at the end of September, 1969 to ascertain the nature and extent of repair. He formed the opinion that they were not badly damaged and could have been holiday tested and repaired to acceptable standard in Singapore by Hume Industries or Asia Engineering Limited. He saw damage to the external coatings *i.e.* tear, abrasion and removal of white-wash, in a number of places. He further saw that the concrete lining had broken away at certain places. The circumferential marks e.g. in Ex. D1 (5) were marks normally seen after the whitewash was removed. He also saw some dents which, he said, were capable of manual repair by using a jet and heating the place and that it was not necessary to strip the

wrapper or lining to repair the dents unless the lining adjacent to it was badly broken.

It is clear from the evidence that the plaintiffs sought to prove damage on the strength of the testimony of three witnesses who saw the pipes. However, I find their evidence exiguous. Mr. Tan is probably not a man of very strong initiative. I do not think he had any clear or instructed insight into the true nature of the damage, much less as to the degree to which some form of repair might be effected. He consulted his subordinate who I am certain dominated the scene. And when I come to look at the condition of the policy it seems clear to me beyond argument that there was a duty upon the plaintiffs to notify the underwriters and a survey report obtained from them. There is nothing to explain their failure to ask for such a report, or for a prompt and detailed examination of the pipes except their own intention to cash in on the casualty. I think I am right in saying that the plaintiffs cannot take advantage of the non-fulfilment of the condition, the performance of which had been hindered by them. The damage *i.e.* wrappings, dented lips and lining, was superficial and curable locally, and the possibility that there might be other damage not visible to the naked eye is entirely speculative and unproven to the point of improbability. Mr. Booth's testimony is suspect due to the length of time when he saw the pipes and the possibility that they had considerably deteriorated since the date of the casualty cannot be excluded. Mr. Lim described his examination as casual. Mr. Wilcox's testimony leaves much to be desired. He was never invited to inspect the pipes. That is an important factor, because being the certifying officer he would be the person having a final say in the matter. The plaintiffs' failure to do so had revealed a deplorable state of affairs.

In my judgment, without a detailed examination, we do not know for certain the actual damage, much less the cost of repair. The evidence does not justify me in holding there was damage whenever it looks as if there was damage. I do not think, therefore, there was a constructive total loss within the meaning of the policy. If these three witnesses intended to say that, I reject their evidence on this point. I accept the evidence of Mr. Clarke and Mr. Gray.

Being then of the opinion that there was no constructive total loss, it remains to consider the next question whether the plaintiffs are entitled to recover as for an actual total loss based on the *de minimis* rule. The point is whether 12 pipes which survived a whole shipment of 668 pipes can be disregarded as negligible so that by applying the rule the whole shipment can be considered as actually lost. There are two sides to the argument.

Mr. Gratiaen's argument, taken as a whole, came, in effect, to the general proposition that the surviving pipes, even on the assumption that there was some damage, superficial or otherwise (and that was uncertain) and lost their identity as the goods which the plaintiffs had shipped to Brunei. It can be said with some force that the percentage involved is very small indeed; 12 pipes is about 1.7% of the whole consignment. It can therefore be contended that that is so minimal and trivial that it can be ignored.

Mr. Mustill, on the other side, founded his argument on certain general considerations of the Institute Cargo Clauses (F.P.A.) attached to the policy, and, in particular, Clause 5. I need not make detailed references to it save that the prime feature of that kind of insurance is that the assured gets the benefit of a low premium while the underwriters get the benefit of freedom from claim of partial loss Nothing short of a total loss can found a claim under the policy. It is against that background that I was urged by Mr. Mustill to consider the application of the *de minimis* rule.

That rule has come before the courts in a number of cases of which the most familiar are those relating to the sale of goods and tenancy. Indeed learned counsel has referred me to some of the interesting cases. I do not propose to refer to all of them and the absence of such comment must not be taken to mean that I have not given them the fullest consideration. It is therefore unnecessary to do more than refer to the latest authority on the point *i.e.* the case of *Margaronis Navigation Agency Ltd.* v. *Henry W. Peabody & Co. of London Ltd.*[7] where Mr. Mustill himself appeared before the Court of Appeal. Mr. Gratiaen too has placed much reliance on that case. I think I can say without fear of contradiction that a principle to be gleaned from that case is that the *de minimis* rule is a rule of general application and its scope must not be strained till it is narrowed to a filament. It matters not that it is used as a shield or as a sword; the court must consider the substance of the matter and will not regard or give effect to something of a trivial and negligible nature. In that case, no attempt was made to give an exhaustive classification of the cases where the principle should be applied. Indeed it would be wrong to do so.

Without going into the facts, *Margaronis'* case turned entirely on the question whether the cargo which was loaded by 5.00 p.m. on Friday, December 29, 1961, was "a full and complete cargo" and was, on a proper interpretation, a loading of 12,600 tons. That narrowed the issue to the question whether the shortage of just under 12 tons of the stipulated requirement of 12,600 tons was a fulfilment of the contract or was not a loading of the quality which became the vital matter then (*ibid.*, at page 443). The umpire took the view that —

"a cargo of 12,588 tons 4 cwts. was not equivalent in a commercial sense to a cargo of 12,600 tons"

and that that amount was —

"not in a commercial sense a full and complete cargo so as to comply with an obligation to load a full and complete cargo of 12,600 tons provided the vessel could take the large quantity."

(*ibid.*, at page 443). Roskill J., in the commercial court, upheld the umpire's award. It is interesting to note some of the passages in the judgment of the Court of Appeal. Sellers L.J. said this at pages 445, 446:

"It may be said that on the construction of this contract when it was entered into it would be on the basis that any negligible variation from the 12,600 tons, if that was the quantity which ultimately could be taken within "a full and

complete cargo," would be subject to the *de misimis* rule. Then when the rule came to be applied it was a matter of fact whether, in all the circumstances, precise accuracy could be obtained (as I think it might well have been here) or whether there were limits of accuracy which were commercially reasonable or (as the argument for the owners would have it) which were not commercially significant.

There is, I think, very little law involved in a decision on an issue such as that. But the judge, I think rightly, said that it is a matter in which a court might, having regard to the authorities (some fairly recent in this court), interfere, because it is a mixed question of fact and law. But substantially, and particularly when we come to consider in this court whether we would interfere, it is a matter of fact whether, on the basis that there is this shortage below the agreed figure of 12,600 tons, that is so negligible in the circumstances of the case, having regard to all the factors, that it ought to have been ignored.

For myself, I think that there is very little evidence, if any, except those bare statements of the figures themselves and the obligation under the charterparty to load that amount which would permit the court to say that this quantity was negligible. On the other hand, there does seem to be evidence before us now, if we look at it, that there was a view to be taken the other way. An experienced umpire, conversant with the trade and no doubt familiar with the Baltic engagements with regard to charter-parties, had to decide whether this was or not a negligible matter. He came down on the side that it was something of moment and that by 5 p.m. on Friday, December 29, 1961, the ship was not completely loaded."

Then Pearson L.J. said this at page 447:

"Once it is appreciated what the test is, namely, whether the *de minimis* rule applies or not, whether the departure from the precise terms of the obligation is so trivial as to be negligible or whether it has some significance, then the rest becomes a pure question of fact."

Diplock L.J. said on pages 448, 449:

"In this case the relevant circumstances to consider were, not only that the charterers had undertaken to load "a full and complete cargo," but that the master had already specified — as he was entitled to under the contract — 12,600 tons as the full and complete cargo; and the amount of goods being loaded could be measured within a very small margin of error, much smaller than the 11 tons 16 cwts. which Mr. Mustill has said the court should ignore.

I can see, in those circumstances, like my brethren, no ground for overruling the finding of the umpire to which they have referred. Not only do I see no reason for overruling it — and it is very much a matter of mixed law and fact, in which the opinion of a commercial arbitrator is entitled to great weight and respect — but I myself would hold, even without such finding, that this, for the reasons I have already indicated, did not fall within the rule de minimis non curat lex, because it was quite plainly, on the facts of the case, commercially practicable to get very much closer than that to the "full and complete cargo" of 12,600 tons."

Those observations of the Court of Appeal do, I think, throw light on the scope of the rule and it would appear to indicate that once it is appreciated whether the rule applies, then the rest becomes a pure question of fact. In my judgment, 12 pipes measuring a total of 360 feet, weighing 36 tons, costing $14,400 and insured at $16,000, affect far too high a proportion of the whole consignment of 668 pipes to be capable of being dismissed as a matter *de minimis*. It may well be that in the case of a single pipe or two out of the whole consignment, the rule would apply, but I fail to see how it is possible to hold that 12 pipes can be ignored or treated as trifling and to be brushed aside. I find therefore on the facts before me that a consignment of 668 pipes is not totally lost when 12 pipes making it up are not lost.

The plaintiffs' case is dismissed with costs.

Claim dismissed.

Solicitors: *Ng Ek Teong & Partners; Skrine & Co.*

D.R. GARNER v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) June 9, 1972]

[Penang — Criminal Appeal No. 35 of 1972]

Penal Code, s. 420 — Cheating — Using cheques without account in bank — Using fictitious name — Intention of escaping punishment — Expectation of deportation — Proper sentence.

The accused was convicted and sentenced to 9 months' imprisonment on the charge of cheating a certain salesman by inducing the latter to deliver to him goods to the value of $1,830 with a cheque in respect of which he had no account. He admitted to all the facts. He appealed against sentence.

Held: the accused should be treated as a first offender but there was no mitigating factor in all the circumstances and facts of the case. His sentence should be enhanced to 19 months' jail.

Per Chang Min Tat J.: "I should take the opportunity of correcting an unfortunate misconception that seemed to prevail in certain quarters that the colour of an accused's skin had anything to do with the question of sentence. I am compelled to say that if proper regard was given to the terms of the judgment which I delivered no foundation would be discovered for such a misconception....

I must deplore any idea that a stranger can come to our shores and break our laws with impunity and hope to get away with his crimes in the expectation that he would be deported. The accused will be deported, in due course but only after he has served a proper sentence."

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

Azmel bin Haji Ma'amor (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J. (delivering oral judgment): The accused was charged with the offence of cheating a certain salesman by inducing him to deliver to the accused electronic equipment to the value of $1,830 with a cheque in respect of which he had no account whatsoever. As a result of his representation that he was the operator of an account in the bank for which he held the cheque, the shopkeeper delivered to him the goods. A part of the misrepresentation was the usage of a fictitious name. The cheque when presented to the bank for payment was naturally dishonoured. That occurred 3 days afterwards. The complainant immediately went to the accused's house and found him missing. Two days afterwards, that is, a good 5 days after the purchase of the goods, the accused was arrested by the police at the customs clearance point at Butterworth.

At his trial he admitted all these facts. His plea was accepted and after speaking in mitigation he was convicted and sentenced to 9 months' imprisonment. Against that sentence he appealed. Whether he was advised as he suggested that because of the colour of his skin he could get a binding over or whether he